

ANIMAL DRUG AMENDMENTS AND PATENT TERM
RESTORATION ACT OF 1986

SEPTEMBER 17 (legislative day, SEPTEMBER 15), 1986.—Ordered to be printed

Mr. HATCH, from the Committee on Labor and Human Resources,
submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2407]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2407) to amend provisions of the Federal Food, Drug, and Cosmetic Act relating to new animal drugs, and for other purposes, having considered the same, reports favorably thereon with an amendment and an amendment to the title, and recommends that the bill as amended do pass.

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I. SUMMARY OF THE BILL

This bill is modeled after the Drug Price Competition and Patent Term Restoration Act of 1984 ("DPC/PTR"), Pub. Law 98-417. Its purpose is to extend to veterinary drugs and biologicals the generic competition and restored patent life afforded human pharmaceuticals by the DPC/PTR Act. It thus follows the same balance struck by Congress in 1984 in both fostering lower prices for generic products while restoring to innovators some of the patent protection lost primarily during Food and Drug Administration ("FDA") review of premarket approval applications.

Title I pertaining to generic animal drugs is identical in concept to the human drug provisions of the DPC/PTR Act, but changes have been made to address the unique features of the regulation of veterinary pharmaceuticals. As with human drugs, a generic animal drug product must be bioequivalent to a pioneer (or listed) animal drug product. Furthermore, drugs used in food animals may be required to satisfy additional requirements to assure human food safety from unsafe residues of the drug in edible tissue, milk and eggs.

The bill adopts entirely the patent term restoration formula and process that Congress concluded was appropriate for human pharmaceuticals and biologics in 1984. Title II amends the existing statutes to add veterinary drugs and biologicals to the categories of products eligible for patent term restoration. As with the 1984 law, this bill also reverses *Roche Products, Inc. v. Bolar Pharmaceuticals Company*, 733 F.2d 858 (Fed. Cir. 1984), for controlled products and thus permits testing, but not marketing, of a patented compound before expiration of the patent.

II. BACKGROUND AND NEED FOR LEGISLATION

Prior to enactment of the DPC/PTR Act of 1984, FDA permitted the approval of generic versions of human and animal drugs initially approved before 1962 ("pioneer products") on a showing of bioequivalence of the generic product to the pioneer product. Clinical studies demonstrating the safety and effectiveness of generic products were deemed unnecessary under FDA regulations because findings by the National Academy of Sciences/National Research Council ("NAS/NRC") that pre-62 pioneer drugs were safe and effective, once accepted by FDA, provided publicly available data that could be referenced in applications for generic versions of those drugs. Thus all that needed to be submitted to FDA was evidence showing that the drugs were equivalent, which was done by showing the bioequivalence of the generic to the pioneer.

New human and animal drugs first approved after 1962 did not undergo NAS/NRC review. Because all data demonstrating drug safety and effectiveness in pioneer applications were protected as trade secret information, these data could not be referenced in applications for generic versions even after patent expiration. As a result, generic versions of pioneer drugs approved after 1962 could be approved only in complete new drug applications or new animal drug applications that contained full, albeit duplicative, safety and effectiveness data.

The 1984 legislation changed this situation for human drugs by establishing an abbreviated application system for generic versions of post-1962 pioneer human drugs. Although animal drugs were intended originally to be included in the 1984 legislation, they were removed from consideration for a variety of reasons prior to enactment. As a result, the anomalous situation now exists that generic versions of both pre- and post-1962 human drugs may be approved in an abbreviated application procedure after patent or exclusivity protection has expired, but only generic versions of pre-1962 approved animal drugs may be approved in an abbreviated application. Generic versions of post-1962 approved animal drugs still must undergo expensive and unnecessarily duplicative testing for safety and effectiveness, thereby preventing the savings and other benefits that could derive from a fully abbreviated system.

S. 2407 is designed to bring animal drug regulation into conformity with the human drug regulatory procedures. At the same time, it provides restoration of some patent time lost during the FDA review of NADAs for pioneer products, thereby assuring that the research-oriented companies retain incentives for further research.

III. TEXT OF BILL AS REPORTED

Strike out all after the enacting clause and insert in lieu thereof the following:

A BILL Entitled the "Animal Drug Amendments and Patent Term Restoration Act of 1986".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Animal Drug Amendments and Patent Term Restoration Act of 1986"

TITLE I—ANIMAL DRUG AMENDMENTS

SEC. 101. Section 512(b) of such Act (21 U.S.C. 360b(b)) is amended by inserting "(1)" after "(b)", by designating clauses (1) through (8) as (A) through (H), respectively, and by adding at the end the following:

"The applicant shall also file with the application the patent number and the expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a composition containing such drug, or which claims a method of using such drug, and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. If an application is submitted under this subsection for a drug and a patent which claims such drug, or a composition containing such drug, or a method of using such drug is issued after the date of submission but before approval of the application, the applicant shall amend the application to include the information required by the preceding sentence.

"(2) Any person may file with the Secretary an abbreviated application for the approval of a new animal drug. For purposes of this section, an 'abbreviated application' means any application submitted under this subsection that does not contain the information required by subparagraphs (A), (G), and (H) of paragraph (1), or that contains such information relied on by the applicant for the approval of the application but such information was not information derived either from investigations, studies or tests conducted by or for the applicant or for which the applicant had obtained a right of reference or use (disclosed to the Secretary) from the person by or for whom the investigations, studies or tests were conducted.

"(3)(A) An abbreviated application for a new animal drug shall contain—

"(i) information to show that the conditions of use (including any withdrawal period, residue, tolerance, or similar limitation whether in labeling or published pursuant to section 512(i)) prescribed, recommended, or suggested in the labeling proposed for the new animal drug have been previously approved for a drug whose approval has been published pursuant to section 512(i) (hereafter in this subsection referred to as a 'listed animal drug');

"(ii)(I) if the listed animal drug referred to in clause (i) has only one active ingredient, information to show that the active ingredient of the new animal drug is the same as that of the listed animal drug;

"(II) if the listed animal drug referred to in clause (i) has more than one active ingredient, or is permitted to be used with another animal drug or drugs in animal feed, information to show that the active ingredients of the new animal drug, or the permitted uses with other drugs, are the same as those of the listed animal drug, or

"(III) if the listed animal drug referred to in clause (i) has more than one active ingredient or permitted uses with other animal drugs, and if one of the active ingredients of the new animal drug, or proposed uses with other animal drugs, is different and the application is filed pursuant to the approval of a petition filed under subparagraph (C), information to show that the other active ingredients of the new animal drug are the same as the active ingredients of the listed animal drug, information to show that either the different active ingredient is an active ingredient of another approved animal drug or of an animal drug which does not meet the requirements of section 201(w), or the proposed new uses are with other listed animal drugs or drugs that do not meet the requirements of section 201(w), and such other information respecting the different active ingredient or combination with respect to which the petition was filed as the Secretary may require;

"(iii) information to show that the route of administration, the dosage form, and the strength of the new animal drug are the same as those of the listed animal drug referred to in clause (i) or, if the route of administration, the dosage form, or the strength of the new animal drug is different and the application is filed pursuant to the approval of a petition filed under subparagraph (C), such information respecting the route of administration, dosage form, or strength with respect to which the petition was filed as the Secretary may require;

"(iv) information to show that the new animal drug is bioequivalent to the listed animal drug referred to in clause (i). If the listed new animal drug is approved for use in more than one animal species, the bioequivalency information described in clauses (I), (II), and (III) shall be obtained for such species as the Secretary deems appropriate based on scientific principles. A new animal drug shall be considered to be bioequivalent to a listed animal drug if—

"(I) the rate and extent of absorption of the drug do not show a significant difference from the rate and extent of absorption of the listed animal drug when administered at the same molar dose of the active ingredient under similar experimental conditions in either a single dose or multiple doses;

"(II) the extent of absorption of the new animal drug does not show a significant difference from the extent of absorption of the listed animal drug when administered at the same molar dose of the active ingredient under similar experimental conditions in either a single dose or multiple doses and the difference from the listed animal drug in the rate of absorption of the drug is intentional, is reflected in its proposed labeling, is not essential to the attainment of effective drug concentrations in use, and is considered scientifically insignificant for the drug in attaining the intended purposes of its use and preserving human food safety; or

"(III) where the Secretary finds that the measurement of the rate and extent of absorption or excretion of the new animal drug in biological fluids is inappropriate or impractical, an appropriate acute pharmacological effects test, or other test, of the new animal drug and the listed animal drug in the target species, or in an appropriate animal model, does not show a significant difference between the new animal drug and the listed animal drug when administered at the same molar dose under similar experimental conditions. In the event that bioequivalency data do not establish that the withdrawal period will be the same as that established for the listed drug, the Secretary can require a tissue residue study to establish the withdrawal period, and the assay methodology used in such a study need be no more rigorous than the methodology for the listed drug. If such study is required and if the listed drug is approved for use in more than one animal species, such study shall be conducted for such species as the Secretary deems appropriate based on scientific principles;

"(v) information to show that the withdrawal period for the new animal drug is the same as that for the listed animal drug, which may consist of either

tissue residue studies, bioequivalence studies, or other data or studies as the Secretary deems appropriate based on scientific principles;

"(vi) information to show that the labeling proposed for the new animal drug is the same as the labeling approved for the listed animal drug referred to in clause (i) except for changes required because of differences approved under a petition filed under subparagraph (C) or because the new animal drug and the listed animal drug are produced or distributed by different persons;

"(vii) the items specified in clauses (B) through (F) of subsection (b)(1); and

"(viii) a certification, that in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the listed animal drug referred to in clause (i), or which claims a composition containing such listed animal drug, or which claims a use for such animal drug, for which the applicant is seeking approval under this subsection and for which information is required to be filed under subsection (b)(1) or (c)(2)—

"(I) that such patent information has not been filed,

"(II) that such patent has expired,

"(III) of the date on which such patent will expire, or

"(IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new animal drug for which the application is submitted.

The Secretary may not require that an abbreviated application contain information in addition to that required by clauses (i) through (viii).

"(B)(i) An applicant who makes a certification described in subparagraph (A)(viii)(iv) of this subsection shall include in the application a statement that the applicant will, not later than ten days after submission of the application, give the notice required by clause (ii) of this subsection to—

"(I) each owner of the patent which is the subject of the certification or the representative of such owner (e.g. licensee) designated to receive such notice, and

"(II) the holder of the approved application under subsection (b)(1) for the drug which is claimed by the patent, or the composition containing such drug claimed by the patent, or the use of which is claimed by the patent, or the representative of such holder designated to receive such notice.

"(ii) The notice referred to in clause (i) of this subsection shall state that an application, which contains data from bioequivalence studies, has been submitted under this subsection for the drug with respect to which the certification is made to obtain approval to engage in the commercial manufacture, use, or sale of such drug before the expiration of the patent referred to in the certification. Such notice shall include a detailed statement of the factual and legal basis of the applicant's opinion that the patent is invalid or will not be infringed.

"(iii) If an application is amended to include a certification described in subparagraph (A)(viii)(IV), the notice required by clause (ii) shall be given when the amended application is submitted.

"(C)(i) If a person wants to submit an abbreviated application for a new animal drug which has a different active ingredient or whose route of administration, dosage form, strength, use with other animal drugs, tolerance, withdrawal period, or other use restriction differ from that of an approved animal drug referred to in clause (i), such person shall submit a petition to the Secretary seeking permission to file such an application. The Secretary shall approve or disapprove a petition submitted under this subparagraph within ninety days of the date the petition is submitted. The Secretary shall approve such a petition unless the Secretary finds—

"(I) that field investigations must be conducted to show the safety and effectiveness of the animal drug or of any of its active ingredients, the route of administration, the dosage form, strength, the use with other animal drugs, the tolerance, the withdrawal period, or any other use restrictions which differ from the approved animal drug; or

"(II) that any animal drug with a different active ingredient (including an active ingredient that is part of an uncharacterized mixture) or use with another animal drug may not be adequately evaluated for approval as safe and effective on the basis of the information required to be submitted in an abbreviated application."

AMENDMENTS TO SECTION 512 (C)

SEC. 102. (a) Section 512(c) of such Act (21 U.S.C. 360b(c)) is amended by inserting "(1)" after "(c)", by redesignating clauses (1) and (2) as clauses (A) and (B), respectively, and by adding at the end the following:

"(2) If the patent information described in subsection (b)(1) could not be filed with the submission of an application under subsection (b)(1) because the application was filed before the patent information was required under subsection (b)(1) or a patent was issued after the application shall file with the Secretary, prior to the approval of the application, the patent number and the expiration date of any patent which claims the drug for which the application was submitted, or which claims a composition containing such drug, or which claims a method of using such drug, and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. If the holder of an approved application could not file patent information under subsection (b)(1) because no patent had been issued when an application was approved, the holder shall file such information under this subsection no later than thirty days after the date the patent involved is issued."

(b) Section 512(c)(1)(A) of such Act, as redesignated, is amended by inserting "the applicable paragraph of" immediately following "for denying approval specified in".

(c) The following paragraph is added at the end of subsection (c):

"(3) An order issued pursuant to paragraph (1)(A) of this subsection (c), approving an application submitted under subsection (b)(2), shall be made effective on the last applicable date determined under the following:

"(A) If the applicant only made a certification described in subclause (I) or (II) of subsection (b)(3)(A)(viii) or in both such subclauses, the approval shall be made effective immediately.

"(B) If the applicant made a certification described in subclause (III) of subsection (b)(3)(A)(viii), the approval shall be made effective on the date certified under subclause (III).

"(C) If the applicant made a certification described in subclause (IV) of subsection (b)(3)(A)(viii), the approval shall be made effective immediately unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice provided under subsection (b)(3)(B)(i) is received. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under subsection (b)(3)(B)(i) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that—

"(i) if before the expiration of such period the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of the court decision, or

"(ii) if before the expiration of such period the court decides that such patent has been infringed, the approval shall be made effective on such date as the court orders under section 271(e)(4)(A) of title 35, United States Code.

In such an action, each of the parties shall reasonably cooperate in expediting the action. Until the expiration of forty-five days from the date the notice made under subsection (b)(3)(B)(i) is received, no action may be brought under section 2201 of title 28, United States Code, for a declaratory judgment with respect to the patent. Any action brought under section 2201 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

"(D) If the application contains a certification described in subclause (IV) of subsection (b)(3)(A)(viii) and is for an animal drug for which a previous application has been submitted under this section containing such a certification, the application shall be made effective not earlier than one hundred and eighty days after—

"(i) the date the Secretary receives notice from the applicant under the previous application of the first commercial marketing of the animal drug under the previous application, or

"(ii) the date of a decision of a court in an action described in subparagraph (C) holding the patent which is the subject of the certification to be invalid or not infringed, whichever is earlier.

"(e)(i) If an application submitted under subsection (b)(1) for an animal drug, no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under subsection (b)(1), is approved after the date of the enactment of this paragraph, no application may be submitted under subsection (b)(2) which refers to the drug for which the subsection (b)(1) application was submitted before the expiration of five years from the date of the approval of the application under subsection (b)(1), except that such

an application may be submitted under subsection (b)(2) after the expiration of four years from the date of the approval of the subsection (b)(1) application if it contains a certification of patent invalidity or noninfringement described in subclause (IV) of subsection (b)(3)(A)(viii). The approval of such an application shall be made effective in accordance with subparagraph (C) of this subsection (c)(3) except that, if an action for patent infringement is commenced during the one-year period beginning forty-eight months after the date of the approval of the subsection (b)(1) application, the thirty-month period referred to in subparagraph (C) shall be extended by such amount of time (if any) which is required for seven and one-half years to have elapsed from the date of approval of the subsection (b)(1) application.

"(ii) If an application (which includes any supplement to such application) submitted under subsection (b)(1) for an animal drug, which includes an active ingredient (including any ester or salt of the active ingredient) for use in the same or a different species or class of animals, that is, nonfood producing, ruminant, swine, or poultry, as has been approved in another application submitted under subsection (b)(1), is approved after the date of enactment of this paragraph and if the application contains reports of new investigations (other than bioequivalency studies) essential to the new approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application (including any supplement to such application) submitted under subsection (b)(2) for the new conditions of approval of such drug in the subsection (b)(1) application effective before the expiration of three years from the date of the approval of the application under subsection (b)(1) for such drug.

"(iii) If an application (other than an abbreviated new animal drug application) submitted under subsection (b)(1), for a new animal drug, no active ingredient (including an ester or salt of the active ingredient) of which has been approved in any other application under subsection (b)(1), was approved during the period beginning on the date which is two years before the enactment date of this subsection and ending on the enactment date of this subsection, the Secretary may not make the approval of an application which refers to the animal drug for which the subsection (b)(2) application was submitted effective before the expiration of five years from the date of approval of the application under subsection (b)(1).

AMENDMENTS TO SECTION 512 (d)

SEC. 103. (a) Section 512(d)(1) of such Act (21 U.S.C. 360b(d)(1)) is amended by inserting after "finds" the words "with respect to an application filed under subsection (b)(1)"; by inserting "(1)" after "(b)" in subparagraph (A); and by redesignating subparagraphs (G) and (H) as subparagraphs (H) and (I) and inserting after subparagraph (F) the following: "(G) the application failed to contain the patent information prescribed by subsection (b)(1);".

(b) The last sentence of subsection 512(d)(1) of such Act is amended by striking "(H)" and inserting in lieu thereof "(I)".

(c) The following paragraph is added at the end of subsection (d):

"(4) If the Secretary finds with respect to an application filed under subsection (b)(2), after due notice to the applicant in accordance with subsection (c) and giving him an opportunity for a hearing, in accordance with said subsection, that—

"(A) the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug are inadequate to assure and preserve its identity, strength, quality, and purity;

"(B) information submitted with the application is insufficient to show that each of the proposed conditions of use has been previously approved for the listed animal drug referred to in the application;

"(C)(i) if the listed animal drug has only one active ingredient, information submitted with the application is insufficient to show that the active ingredient is the same as that of the listed drug;

"(ii) if the listed animal drug has more than one active ingredients, or permitted uses with other animal drugs, information submitted with the application is insufficient to show that the active ingredients or permitted uses with other animal drugs are the same as those for the listed animal drug, or

"(iii) if the listed animal drug has more than one active ingredient or permitted use with other approved animal drugs in animal feed and if the application is for a new animal drug which has an active ingredient or proposed permitted use different from the listed animal drug, information submitted with the application is insufficient to show—

"(I) that the other active ingredients or permitted uses are the same as for the listed animal drug, or

"(II) that the different active ingredient or proposed use is an active ingredient of, or a proposed use with, a listed animal drug or an animal drug which does not meet the requirements of section 201(w),

or no petition to file an application for the drug with the different ingredient or use was approved under subsection (b)(3)(C);

"(D)(i) if the application is for a drug whose route of administration, dosage form, or strength of the drug is the same as the route of administration, dosage form, or strength of the approved animal drug referred to in the application, information submitted in the application is insufficient to show that the route of administration, dosage form, or strength is the same as that of the approved animal drug, or

"(ii) if the application is for a drug whose route of administration, dosage form, or strength of the drug is different from that of the approved animal drug referred to in the application, no petition to file an application for the drug with the different route of administration, dosage form, or strength was approved under subsection (b)(3)(C);

"(E)(i) if the application is for a drug for which the methods of analysis for residues of such drug or substances formed in or on food from such drug, tolerances, withdrawal periods, or other use restrictions are the same as the methods of analysis, tolerances, withdrawal times and other use restrictions of the listed animal drug referred to in the application, information submitted in the application is insufficient to show that the drug is bioequivalent to the approved animal drug; or

"(ii) if the application is for a drug for which the methods of analysis, tolerances, withdrawal periods or other use restrictions are different from those of the listed animal drug referred to in the application, no petition to file an application for a drug with a different method of analysis, tolerance, withdrawal period or other use restriction was approved under subsection (b)(3)(C);

"(F) if the application was filed pursuant to the approval of a petition under subsection (b)(3)(C), the application did not contain the information required by the Secretary respecting the active ingredient, route of administration, dosage form, strength, method of analysis, tolerance, withdrawal period or other use restriction which is not the same;

"(G) information submitted in the application is insufficient to show that the (i) drug is bioequivalent to the listed animal drug referred to in the application or meets any criteria established by the Secretary for the listed drug concerning active ingredients that are part of an uncharacterized mixture, (ii) the withdrawal period and tolerance are not the same as the listed animal drug referred to in the application; or, (iii) if the application was filed pursuant to a petition approved under subsection (b)(3)(C), information submitted in the application is insufficient to show that the active ingredients of the new animal drug are of the same pharmacological or therapeutic class as those of the approved animal drug referred to in subsection (b)(3)(A)(i) and that the new animal drug can be expected to have the same therapeutic effect as the listed animal drug when administered to animals for a condition of use referred to in such subsection;

"(H) information submitted in the application is insufficient to show that the labeling proposed for the drug is the same as the labeling approved for the listed animal drug referred to in the application except for changes required because of differences approved under a petition filed under subsection (b)(3)(C) or because the new animal drug and the listed animal drug are produced or distributed by different persons;

"(I) information submitted in the application or any other information available to the Secretary shows that (i) the inactive ingredients of the new animal drug are unsafe for use under the conditions prescribed, recommended, or suggested in the labeling proposed for the drug, or (ii) the composition of the new animal drug is unsafe under such conditions because of the type or quantity of inactive ingredients included or the manner in which the inactive ingredients are included or the failure of components of an uncharacterized mixture to meet the criteria established by the Secretary for the approved animal drug;

"(J) the approval under subsection (c) of the listed animal drug referred to in the application under subsection (b)(2) has been withdrawn or suspended for grounds described in subparagraphs (A) through (C) of subsection (e)(1); the Secretary has published a notice of opportunity for hearing to withdraw approval of the listed animal drug for grounds described in subparagraphs (A) through (C) of subsection (e)(1); the approval under this section of the listed animal drug

referred to in the application under subsection (b)(2) has been withdrawn or suspended under subsection (e) (1) or (3); or the Secretary has determined that the listed animal drug has been withdrawn from sale for safety or effectiveness reasons;

"(K) the application does not meet any other requirement of subsection (b)(3)(A);

"(L) based on a fair evaluation of all material facts, the labeling of the new animal drug is false or misleading in any particular; or

"(M) the application contains an untrue statement of material fact;

he shall issue an order refusing to approve the application. If, after such notice and opportunity for a hearing, the Secretary finds that subparagraphs (A) through (M) do not apply, he shall issue an order approving the application, which shall be made effective on the last applicable date determined under subsection (c)(3)."

AMENDMENTS TO SECTION 512 (e)

SEC. 104. (a) Section 512(e) of such Act (21 U.S.C. 360b(e)) is amended by redesignating paragraphs (2) and (3) as (4) and (6).

(b) Paragraph (1) of such section is amended—

(1) by inserting "(1)" after "(b)";

(2) by deleting "(H)" in subparagraph (B) and inserting in lieu thereof "(I)";

(3) by inserting "or" after the semicolon at the end of subparagraph (C);

(4) by redesignating subparagraphs (D) and (E) as (A) and (B); and

(5) by inserting the following after subparagraph (C):

"(D) the patent information prescribed by subsection (c)(2) was not filed within thirty days after the receipt of written notice from the Secretary specifying the failure to file such information.

"(2) The Secretary shall also, after due notice and opportunity for hearing to the applicant, issue an order withdrawing the approval of an application with respect to any new animal drug under this section if the Secretary finds—"

(c) The sentence following paragraph (2)(B) of such section (as redesignated) is designated as paragraph (3), and the words "such application" are deleted and the words "any application approved under subsection (c)" are inserted in lieu thereof in that sentence.

(d) The following paragraph is added following paragraph (4) (as redesignated):

"(5) If an animal drug approved under this section refers in its approved application to a new animal drug the approval of which was withdrawn or suspended for grounds described in subparagraphs (A) through (C) of subsection (e)(1) or which, as determined by the Secretary, has been withdrawn from sale for safety or effectiveness reasons, the approval of the animal drug under this section shall be withdrawn or suspended—

"(A) for the same period as the withdrawal or suspension under subsection (e)(1), or

"(B) if the listed animal drug has been withdrawn from sale, for the period of withdrawal from sale or, if earlier, the period ending on the date the Secretary determines that the withdrawal from sale is not for safety or effectiveness reasons."

AMENDMENTS TO SECTION 512 (i)

SEC. 105. Section 512(i) of such Act (21 U.S.C. 360b(i)) is amended—

(1) by inserting "(1)" after "(b)";

(2) by deleting the words "by notice, which upon publication shall be effective as a regulation,";

(3) by inserting the words "established name of the approved new animal drug and any propriety name, the patent information submitted under subsections (b)(1) and (c)(2), and any period during which abbreviated applications may not be made effective pursuant to subsection (c)(3)(E)," after "applicant"; and

(4) by deleting the second sentence, and inserting in lieu thereof: "Upon withdrawal of approval of any new animal drug application filed pursuant to subsection (b)(1), or upon its suspension, the Secretary shall forthwith publish in the Federal Register the name and address of the applicant and the established and any propriety name of the drug, and a brief statement of the statutory basis for the action (or that such withdrawal is at the request of the applicant)."

ADDITIONAL AMENDMENTS

SEC. 106. Section 512 of such Act (U.S.C. 360b) is further amended by inserting after subsection (n) the following:

"(o) For purposes of this section, the term 'patent' means a patent issued by the Patent and Trademark Office of the Department of Commerce."

SEC. 107. (a) The Secretary of Health and Human Services shall promulgate, in accordance with the notice and comment requirements of section 553 of title 5, United States Code, such regulations as may be necessary for the administration of section 512 of the Federal Food, Drug, and Cosmetic Act, as amended by sections 101 through 107 of this Act, within one year of the date of enactment of this Act.

(b) During the period beginning sixty days after the date of the enactment of this Act and ending on the date regulations promulgated under section (a) take effect, abbreviated new animal drug applications may be submitted in accordance with the provisions of section 314.2 of title 21 of the Code of Federal Regulations and shall be considered as suitable for any drug which has been approved for safety and effectiveness under section 512(c) of the Federal Food, Drug, and Cosmetic Act before the date of the enactment of this Act. If any such provision of section 314.2 is inconsistent with the requirements of section 512 of the Federal Food, Drug, and Cosmetic Act as amended or added by this Act, the Secretary shall consider the application under the applicable requirements of section 512 as amended or added.

SEC. 108. Section 2201(b) of title 28, United States Code, is amended by deleting "section 505" and inserting in lieu thereof "sections 505 and 512".

TITLE II—PATENT EXTENSION

SEC. 201. Section 156 of title 35 of the United States Code is amended as follows:

(a) subsection (c)(2) is amended by deleting the words "and (3)(B)(i)" and inserting in lieu thereof "(3)(B)(i), (4)(B)(i), and (5)(B)(i).";

(b) subsection (d)(1)(C) is amended by inserting after the words "the Secretary of Health and Human Services" the following words "or the Secretary of Agriculture, as appropriate,";

(c) subsection (d)(2)(A) is amended (1) by deleting the words "human drug" and inserting in lieu thereof the words "human or animal drug," (2) by inserting after the words "Federal, Food, Drug, and Cosmetic Act," the following words "or the Secretary of Agriculture if the patent claims a veterinary biological product or a method of using or manufacturing such a product and if the product is subject to the Virus-Serum-Toxin Act,"

(d) subsection (d)(2)(B)(i) is amended by deleting the first word of the last sentence and by inserting in lieu thereof the following "For a product, device or additive subject to the Federal Food, Drug and Cosmetic Act, the" and by adding the following sentence at the end of the subparagraph: "For a product subject to the Virus-Serum-Toxin Act, the Secretary of Agriculture may not delegate the authority to make the determination prescribed by this subparagraph to an office below the Office of the Assistant Secretary for Marketing and Inspection Services."

SEC. 202. Section 156 of title 35 of the United States Code is amended as follows:

(a) subsection (f)(1)(A) is amended by deleting the word "human" therefrom;

(b) subsection (f)(1) is amended by adding a new subparagraph "(C)" as follows:

(C) A veterinary biological subject to regulation under the Virus-Serum-Toxin Act."

(c) subsection (f)(2) is amended by deleting the word "human" from the phrase "human drug product" and by inserting following the words "new drug," the words "new animal drug,";

(d) subsection (g) is amended by redesignating subparagraph (4) as subparagraph (6) and by inserting between subparagraph (3) and subparagraph (6), as renumbered, new subparagraphs (4) and (5), as follows:

"(4)(A) In the case of a product which is a new animal drug, the term means the period described in subparagraph (B) to which the limitation described in paragraph (6) applies.

"(B) The regulatory review period for a new animal drug product is the sum of—

"(i) the period beginning on the date an exemption under subsection (j) of section 512 became effective for the approved new animal drug product and ending on the date an application was initially submitted for such animal drug product under section 512, and

"(ii) the period beginning on the date the application was initially submitted for the approved animal drug product under subsection (b) of section 512 and ending on the date after enactment of this section such application was approved under such section."

"(5)(A) In the case of a product which is a veterinary biological, the term means the period described in subparagraph (B) to which the limitation described in paragraph (6) applies."

"(B) The regulatory period for a veterinary biological product is the sum of—

"(i) the period beginning on the date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act became effective and ending on the date an application for a license was submitted under the Virus-Serum-Toxin Act, and

"(ii) the period beginning on the date an application for a license was submitted for approval under the Virus-Serum-Toxin Act and ending on the date after enactment of this section such license was issued."

SEC. 203. Section 271 of title 35, United States Code, is amended as follows:

(a) subsection (e)(1) is amended by deleting in its entirety the language in parentheses and by deleting the period at the end thereof and inserting in lieu thereof the following: "or veterinary biological products.";

(b) subsection (e)(2) is amended by deleting the words "under section 505(j) of the Federal Food, Drug, and Cosmetic Act or described in section 505(b)(2) of such Act for a drug" and inserting in their place the words "under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products" and by inserting between the words "sale of a drug" and "claimed in a patent" the words "or veterinary biological products."

Amend the title so as to read:

A bill to amend provisions of the Federal Food, Drug, and Cosmetic Act relating to new animal drugs, and for other purposes.

IV. COMMITTEE VIEWS

The Committee believes that the regulatory scheme enacted for human drugs in 1984 should be extended to animal drugs because we expect similar, though perhaps not as great, cost savings to result from veterinary drug competition to these that have occurred in the human drug area. At the same time, however, we recognize that there are significant differences in human and animal drugs that must be referred in their regulation. Specifically, animal drugs may be approved for use in animals whose edible tissue, milk or eggs are food for humans. Accordingly, the regulation of drugs for use in food animals must assure human food safety as well as therapeutic safety and effectiveness. This bill provides FDA with ample authority to require necessary data to assure human food safety. FDA has published a Bioequivalence Study Guideline that contains FDA's current requirements for bioequivalence and tissue residue studies. Similar requirements have been applied to generic versions of pre-1962 drugs for use in various food animal species for over fifteen years without any human food safety problems arising from unsafe residues. These requirements will be applied to generic versions of post-1962 drugs upon passage of this bill so that FDA can continue to assure the safety of the human food supply from unsafe residues of animal drugs.

V. SECTION-BY-SECTION ANALYSIS

TITLE I—ANIMAL DRUG AMENDMENTS

Section 101: This section defines an abbreviated new animal drug application ("ANADA") as an application that contains evidence of

bioequivalence to a listed (i.e. currently approved) animal drug as well as all other elements required under the Federal Food Drug and Cosmetics Act ("FFDCA") for new animal drug applications ("NADA") except full reports of safety and effectiveness and tolerance and food quantity information. Thus it parallels the DPC/PTR Act in not requiring a generic product to duplicate the safety and efficacy studies performed for the pioneer product. Unlike that Act, the definition encompasses both ANADAs and paper NADAs. Paper NADAs have not been significant for post-1962 new animal drugs; thus there is no need, as in the DPC/PTR Act, for a separate section for paper NADAs.

This section requires that an applicant show that the generic animal drug is bioequivalent to the listed animal drug with respect to the conditions of use in one major species in which the listed drug is approved. As with the DPC/PTR Act, when the drugs are shown to be bioequivalent, the applicant for the ANADA receives approval for labeling generics as identical to the listed drug, including withdrawal periods and tolerances in all approved species, since the drugs, by definition, are equivalent.

The bill provides that in the event that bioequivalence data do not establish a withdrawal period, the Secretary can require a tissue residue study to establish the withdrawal period.¹ The assay methodology may be of the same type used to support the listed drug to avoid establishing an inequitable barrier to approval of ANADAs.

Section 102: This section deals with the procedures for approving ANADAs. It is essentially identical to that for human drugs as amended by the DPC/PTR Act regarding submission of patent information, notification to patent holders, and initiation of litigation. Five years of exclusive marketing are provided for animal drugs that are new chemical entities approved after enactment of the legislation. A supplemental NADA, or an NADA for a new claim, that is based on studies showing effectiveness can achieve protection from ANADAs for three years for the new claim alone.

As a matter of equity, the bill contains a transitional provision, analogous of the provision in the DPC/PTR Act, providing that all NADAs approved within two years prior to enactment of the bill will receive the same five years of protection from ANADA competition and NADAs approved after enactment.

Section 103: This section amends Section 512(d) of the FFDCA which sets forth the grounds for approving or refusing to approve ANADAs and other NADAs. It incorporates, for consistency, those requirements for approvals of ANADAs that are added by Section 102. Like the DPC/PTR Act, it precludes approvals for ANADAs when FDA has withdrawn the NADA for the approved animal drug for safety or effectiveness reasons, when FDA determines that the approved animal drug was voluntarily removed from the market for these reasons, or when FDA has issued a notice of opportunity for hearing proposing to withdraw approval of the NADA for the approved animal drug for safety and effectiveness reasons and is actively pursuing the matter.

¹ See p. 13 for Committee consideration of amendments.

Section 104: This section clarifies the grounds for withdrawing approved NADAs and ANADAs. The criteria are consistent with those added by sections 102 and 103.

Section 105: Subsection 512(i) of the FFDCA is unique to animal regulation and requires that once FDA approves an NADA, notice of the approval is published in the Federal Register and shall, upon publication, "be effective as a regulation." This triggers publication of the approval in Part 500 of Title 21 of the Code of Federal Regulations. Section 105 amends section 512(i) to delete the characterization of the "notice" as a regulation.

Section 106: This section adds to section 512 a definition of the term "patent."

Section 107: This section is a transition provision that requires FDA to promulgate regulations to implement an ANADA approval system within one year. It permits abbreviated applications to be submitted beginning 60 days from date of enactment of the legislation.

Section 108: This section adds a reference in section 512 to the patent restoration provisions of Title 28.

TITLE II—PATENT EXTENSION

Section 201: This section amends Section 156 of Title 35 to expand these provisions to cover both veterinary drugs and biologics.

Section 202: This section adds veterinary drugs and biologics into the patent term restoration formula that already exists for human drugs and for food additives, including those intended for use in animal feed. Patents for new chemical entities can be extended once for a period not to exceed one-half of the time required for regulatory development review during the investigational new animal drug development phase under Section 512(j) plus the NADA review time, minus any time that the application is not pursued with due diligence. Up to five years patent life can be restored so long as the post-approval patent term does not exceed 14 years. These terms are identical to those applicable to human drugs and food additives in the DPC/PTR Act.

Section 203: This section amends Section 271 of Title 35 to provide that it is not an act of patent infringement to make or use an animal drug or veterinary biological for purposes reasonably related to developing information for a submission to FDA. A similar provision applies to human pharmaceuticals.

VI. COMMITTEE HEARING

On July 18, 1986 the Labor and Human Resources Committee held a hearing on S. 2407. Testimony was received from the Food and Drug Administration, the Animal Health Institute ("AHI"), the Center for Environmental Health and Human Toxicology, the Generic Pharmaceutical Industry Association, and the American Veterinary Medical Association ("AVMA"). All testified in support of the bill. AHI expressed reservations about the limited amount of testing required by the bill for demonstrating bioequivalence and human food safety although FDA believed it had adequate authority to regulate human food safety. Senator Simon stated his con-

cern that the provisions of the bill be sufficient to protect adequately the human food safety from unsafe residues. AVMA proposed an amendment to the bill that would include animal drugs under the prescription drug requirements of section 503 of the FFDCA.

VII. VOTES IN COMMITTEE

On August 6, 1986, the Labor and Human Resources Committee met in open session. Chairman Hatch presented three amendments to the bill addressing the human food safety concerns that had been raised at the hearing. One amendment clarified and strengthened FDA's authority to require bioequivalence tests for drugs approved for use in more than one animal species. It provided that FDA may request such tests "in such species as [it] deems appropriate based on scientific principles." A second amendment authorized FDA to require tissue residue studies "in such species as [it] deems appropriate based on scientific principles" in situations where bioequivalence studies do not establish a withdrawal period and tissue residue studies are required, and the drug is approved for use in more than one species. A third amendment made clear that information to show that the withdrawal period for the generic drug is the same as the withdrawal period for the listed drug may consist of tissue residue studies, bioequivalence studies, or other data or studies as the FDA deems appropriate based upon scientific principles.

Senator Simon stated that he wants FDA to require as many bioequivalence tests and tissue residue studies as are needed to assure the safety of food for humans in food animals. The Committee agrees and intends that FDA fully utilize the discretion provided it in these amendments to assure human food safety.

Whereupon the Committee amended the bill, and by voice vote unanimously ordered it favorably reported.

VII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 10, 1986.

HON. ORRIN G. HATCH,
*Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2407, the animal Drug Amendments and Patent Term Restoration Act of 1986, as ordered reported by the Senate Committee on Labor and Human Resources on August 6, 1986.

We estimate that enactment of this bill could result in increased personnel costs to the federal government of about \$2.5 million in each fiscal year. This bill may also result in limited savings if cheaper, generic animal drugs are made available for purchase by the federal government.

Title I of this bill would allow animal drug manufacturers to use an abbreviated new animal drug application (ANADA) when seeking approval to make generic copies of drugs that were approved by

the Food and Drug Administration (FDA) after 1962. Currently, FDA reviews ANADA's for generic copies of pre-1962 approved animal drugs. FDA estimates that enactment of S. 2407 would increase their workload as the number of ANADA's filed by manufacturers would increase. Title I could cost the FDA about \$2 million annually. The actual cost to the federal government would depend on the extent to which FDA would expand to accommodate the increased workload.

Enactment of this legislation could also result in savings to the federal government and to state and local governments as less expensive, generic copies of some animal drugs would be made available for purchase. We are unable to estimate the amount of savings, but it is likely to be small.

Title II of the bill would extend the amount of time for which patents for animal drugs are issued to include some or all of the time required for a manufacturer to test a product for safety and efficacy and to receive market approval. The activities described in Title II would involve both the FDA and the Patent and Trademark Office (PTO). FDA would be responsible for determining the applicable regulatory review period for a product used in setting the length of patent extension. FDA would also monitor due diligence in product testing which must be shown in order for a manufacturer to receive the maximum possible patent extension. FDA estimates additional cost to them of \$0.4 million annually in order to implement these provisions. PTO would be responsible for determining patent extension eligibility. The PTO Commissioner would be able to charge fees to cover the costs of receiving and acting upon applications. PTO expects no significant additional costs to them as a result of enactment of this bill.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

IX. REGULATORY IMPACT STATEMENT

The Committee has determined that there will be no increase in regulatory burden or paperwork imposed by this bill. Furthermore, to the extent that generic versions of new animal drugs approved since 1962 will now be approvable without unnecessarily repeating costly studies to demonstrate the safety and effectiveness of the drug, this bill significantly decreases the regulatory and paperwork burden.

X. FAMILY FAIRNESS STATEMENT

The Committee has determined that there will be a positive effect on the family from this bill insofar as its enactment may lead to less expensive drugs for companion animals and less expensive food from food animals.

XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended, or replaced (existing law

proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL FOOD, DRUG, AND COSMETIC ACT

* * * * *

CHAPTER V—DRUGS AND DEVICES

SUBCHAPTER A—DRUGS AND DEVICES

ADULTERATED DRUGS AND DEVICES

SECS. 501-511 * * *

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SEC. 512. (a) * * *

(b) (1) Any person may file with the Secretary an application with respect to any intended use or uses of a new animal drug. Such person shall submit to the Secretary as a part of the application [(1)] (A) full reports of investigations which have been made to show whether or not such drug is safe and effective for use; [(2)] (B) a full list of the articles used as components of such drug; [(3)] (C) a full statement of the compositions of such drug; [(4)] (D) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; [(5)] (E) such samples of such drug and of the articles used as components thereof, of any animal feed for use in or on which such drug is intended, and of the edible portions or products (before or after slaughter) of animals to which such drug (directly or in or on animal feed) is intended to be administered, as the Secretary may require; [(6)] (F) specimens of the labeling proposed to be used for such drug, or in case such drug is intended for use in animal feed, proposed labeling appropriate for such use, and specimens of the labeling for the drug to be manufactured, packed, or distributed by the applicant; [(7)] (G) a description of practicable methods for determining the quantity, if any, of such drug in or on food, and any substance formed in or on food, because of its use; and [(8)] (H) the proposed tolerance or withdrawal period or other use restrictions for such drug if any tolerance or withdrawal period or other use restrictions are required in order to assure that the proposed use of such drug will be safe.

The applicant shall also file with the application the patent number and the expiration date of any patent which claims the drug for which the applicant submitted the application or which claims a composition containing such drug, or which claims a method of using such drug, and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. If an application is submitted under this subsection for a drug and a patent which claims such drug, or a composition containing such drug, or a method of using such drug is issued after the date of submission but before approval of the application, the applicant shall amend the application to include the information required by the preceding sentence.

(2) Any person may file with the Secretary an abbreviated application for the approval of a new animal drug. For purposes of this section, an "abbreviated application" means any application submitted under this subsection that does not contain the information required by subparagraphs (A), (G), and (H) of paragraph (1), or that contains such information relied on by the applicant for the approval of the application but such information was not information derived either from investigations, studies or tests conducted by or for the applicant or for which the applicant had obtained a right of reference or use (disclosed to the Secretary) from the person by or for whom the investigations, studies or tests were conducted.

(3)(A) An abbreviated application for a new animal drug shall contain—

(i) information to show that the conditions of use (including any withdrawal period, residue, tolerance, or similar limitation whether in labeling or published pursuant to section 512(i)) prescribed, recommended, or suggested in the labeling proposed for the new animal drug have been previously approved for a drug whose approval has been published pursuant to section 512(i) (hereafter in this subsection referred to as a "listed animal drug");

(ii)(I) if the listed animal drug referred to in clause (i) has only one active ingredient, information to show that the active ingredient of the new animal drug is the same as that of the listed animal drug;

(II) if the listed animal drug referred to in clause (i) has more than one active ingredient, or is permitted to be used with another animal drug or drugs in animal feed, information to show that the active ingredients of the new animal drug, or the permitted uses with other drugs, are the same as those of the listed animal drug, or

(III) if the listed animal drug referred to in clause (i) has more than one active ingredient or permitted uses with other animal drugs, and if one of the active ingredients of the new animal drug, or proposed uses with other animal drugs, is different and the application is filed pursuant to the approval of a petition filed under subparagraph (C), information to show that the other active ingredients of the new animal drug are the same as the active ingredients of the listed animal drug, information to show that either the different active ingredient is an active ingredient of another approved animal drug or of an animal drug which does not meet the requirements of section 201(w), or the proposed new uses are with other listed animal drugs or drugs that do not meet the requirements of section 201(w), and such other information respecting the different active ingredients or combination with respect to which the petition was filed as the Secretary may require;

(iii) information to show that the route of administration, the dosage form, and the strength of the new animal drug are the same as those of the listed animal drug referred to in clause (i) or, if the route of administration, the dosage form, or the strength of the new animal drug is different and the application is filed pursuant to the approval of a petition filed under subparagraph (C), such information respecting the route of ad-

ministration, dosage form, or strength with respect to which the petition was filed as the Secretary may require;

(iv) information to show that the new animal drug is bioequivalent to the listed animal drug referred to in clause (i). If the listed new animal drug is approved for use in more than one animal species, the bioequivalency information described in clauses (I), (II), and (III) shall be obtained for such species as the Secretary deems appropriate based on scientific principles. A new animal drug shall be considered to be bioequivalent to a listed animal drug if—

(I) the rate and extent of absorption of the drug do not show a significant difference from the rate and extent of absorption of the listed animal drug when administered at the same molar dose of the active ingredient under similar experimental conditions in either a single dose or multiple doses;

(II) the extent of absorption of the new animal drug does not show a significant difference from the extent of absorption of the listed animal drug when administered at the same molar dose of the active ingredient under similar experimental conditions in either a single dose or multiple doses and the difference from the listed animal drug in the rate of absorption of the drug is intentional, is reflected in its proposed labeling, is not essential to the attainment of effective drug concentrations in use, and is considered scientifically insignificant for the drug in attaining the intended purposes of its use and preserving human food safety; or

(III) where the Secretary finds that the measurement of the rate and extent of absorption or excretion of the new animal drug in biological fluids is inappropriate or impractical, an appropriate acute pharmacological effects test, or other test, of the new animal drug and the listed animal drug in the target species, or in an appropriate animal model, does not show a significant difference between the new animal drug and the listed animal drug when administered at the same molar dose under similar experimental conditions. In the event that bioequivalency data do not establish that the withdrawal period will be the same as that established for the listed drug, the Secretary can require a tissue residue study to establish the withdrawal period, and the assay methodology used in such a study need be no more rigorous than the methodology for the listed drug. If such study is required and if the listed drug is approved for use in more than one animal species, such study shall be conducted for such species as the Secretary deems appropriate based on scientific principles;

(v) information to show that the withdrawal period for the new animal drug is the same as that for the listed animal drug, which may consist of either tissue residue studies, bioequivalence studies, or other data or studies as the Secretary deems appropriate based on scientific principles;

(vi) information to show that the labeling proposed for the new animal drug is the same as the labeling approved for the

listed animal drug referred to in clause (i) except for changes required because of differences approved under a petition filed under subparagraph (C) or because the new animal drug and the listed animal drug are produced or distributed by different persons;

(vii) the items specified in clauses (B) through (F) of subsection (b)(1); and

(viii) a certification, that in the opinion of the applicant and to the best of his knowledge, with respect to each patent which claims the listed animal drug referred to in clause (i), or which claims a composition containing such listed animal drug, or which claims a use for such approved animal drug, for which the applicant is seeking approval under this subsection and for which information is required to be filed under subsection (b) (1) or (c)(2)—

(I) that such patent information has not been filed

(II) that such patent has expired

(III) of the date on which such patent will expire, or

(IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new animal drug for which the application is submitted.

The Secretary may not require that an abbreviated application contain information in addition to that required by clauses (i) through (viii).

(B)(i) An applicant who makes a certification described in subparagraph (A)(viii)(IV) of this subsection shall include in the application a statement that the applicant will, not later than ten days after submission of the application, give the notice required by clause (ii) of this subsection to—

(I) each owner of the patent which is the subject of the certification or the representative of such owner (e.g. licensee) designated to receive such notice, and

(II) the holder of the approved application under subsection (b)(1) for the drug which is claimed by the patent, or the composition containing such drug claimed by the patent, or the use of which is claimed by the patent, or the representative of such holder designated to receive such notice.

(ii) The notice referred to in clause (i) of this subsection shall state that an application, which contains data from bioequivalence studies, has been submitted under this subsection for the drug with respect to which the certification is made to obtain approval to engage in the commercial manufacture, use, or sale of such drug before the expiration of the patent referred to in the certification. Such notice shall include a detailed statement of the factual and legal basis of the applicant's opinion that the patent is invalid or will not be infringed.

(iii) If an application is amended to include a certification described in subparagraph (A)(viii)(IV), the notice required by clause (ii) shall be given when the amended application is submitted.

(C)(i) If a person wants to submit an abbreviated application for a new animal drug which has a different active ingredient or whose route of administration, dosage form, strength, use with other animal drugs, tolerance, withdrawal period, or other use restriction differ from that of an approved animal drug referred to in clause

(i), such person shall submit a petition to the Secretary seeking permission to file such an application. The Secretary shall approve or disapprove a petition submitted under this subparagraph within ninety days of the date the petition is submitted. The Secretary shall approve such a petition unless the Secretary finds—

(I) that field investigations must be conducted to show the safety and effectiveness of the animal drug or of any of its active ingredients, the route of administration, the dosage form, strength, the use with other animal drugs, the tolerance, the withdrawal period, or any other use restrictions which differ from the approved animal drug; or

(II) that any animal drug with a different active ingredient (including an active ingredient that is part of an uncharacterized mixture) or use with another animal drug may not be adequately evaluated for approval as safe and effective on the basis of the information required to be submitted in an abbreviated application.

(c)(1) Within one hundred and eighty days after the filing of an application pursuant to subsection (b), or such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall either

[(1)] (A) issue an order approving the application if he then finds that none of the grounds in denying approval specified in the applicable paragraph of subsection (d) applies, or

[(2)] (B) give the applicant notice of an opportunity for a hearing before the Secretary under subsection (d) on the question whether such application is approvable. If the applicant elects to accept the opportunity for a hearing by written request within thirty days after such notice, such hearing shall commence not more than ninety days after the expiration of such thirty days unless the Secretary and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the Secretary's order thereon shall be issued within ninety days after the date fixed by the Secretary for filing final briefs.

(2) If the patent information described in subsection (b)(1) could not be filed with the submission of an application under subsection (b)(1) because the application was filed before the patent information was required under subsection (b)(1) or a patent was issued after the application shall file with the Secretary, prior to the approval of the application, the patent number and the expiration date of any patent which claims the drug for which the application was submitted, or which claims a composition containing such drug, or which claims a method of using such drug, and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. If the holder or an approved application could not file patent information under subsection (b)(1) because no patent had been issued when an application was approved, the holder shall file such information under this subsection no later than thirty days after the date the patent involved is issued.

(3) An order issued pursuant to paragraph (1)(A) of this subsection (c), approving an application submitted under subsection (b)(2), shall be made effective on the last applicable date determined under the following:

(A) If the applicant only made a certification described in subclause (I) or (II) of subsection (b)(3)(A)(viii) or in both such subclauses, the approval shall be made effective immediately.

(B) If the applicant made a certification described in subclause (III) of subsection (b)(3)(A)(viii), the approval shall be made effective on the date certified under subclause (III).

(C) If the applicant made a certification described in subclause (IV) of subsection (b)(3)(A)(viii), the approval shall be made effective immediately unless an action is brought for infringement of a patent which is the subject of the certification before the expiration of forty-five days from the date the notice provided under subsection (b)(3)(B)(i) is received. If such an action is brought before the expiration of such days, the approval shall be made effective upon the expiration of the thirty-month period beginning on the date of the receipt of the notice provided under subsection (b)(3)(B)(i) or such shorter or longer period as the court may order because either party to the action failed to reasonably cooperate in expediting the action, except that—

(i) if before the expiration of such period the court decides that such patent is invalid or not infringed, the approval shall be made effective on the date of the court decision, or

(ii) if before the expiration of such period the court decides that such patent has been infringed, the approval shall be made effective on such date as the court orders under section 271(e)(4)(A) of title 35, United States Code.

In such an action, each of the parties shall reasonably cooperate in expediting the action. Until the expiration of forty-five days from the date the notice made under subsection (b)(3)(B)(i) is received, no action may be brought under section 2201 of title 28, United States Code, for a declaratory judgment with respect to the patent. Any action brought under section 2201 shall be brought in the judicial district where the defendant has its principal place of business or a regular and established place of business.

(D) If the application contains a certification described in subclause (IV) of subsection (b)(3)(A)(viii) and is for an animal drug for which a previous application has been submitted under this section containing such a certification, the application shall be made effective not earlier than one hundred and eighty days after—

(i) the date the Secretary receives notice from the applicant under the previous application of the first commercial marketing of the animal drug under the previous application, or

(ii) the date of a decision of a court in an action described in subparagraph (c) holding the patent which is the subject of the certification to be invalid or not infringed, whichever is earlier.

(E)(i) If an application submitted under subsection (b)(1) for an animal drug, no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under subsection (b)(1), is approved after the

date of the enactment of this paragraph, no application may be submitted under subsection (b)(2) which refers to the drug for which the subsection (b)(1) application was submitted before the expiration of five years from the date of the approval of the application under subsection (b)(1), except that such an application may be submitted under subsection (b)(2) after the expiration of four years from the date of the approval of the subsection (b)(1) application if it contains a certification of patent invalidity or noninfringement described in subclause (IV) of subsection (b)(3)(A)(viii). The approval of such an application shall be made effective in accordance with subparagraph (C) of this subsection (c)(3) except that, if an action for patent infringement is commenced during the one-year period beginning forty-eight months after the date of the approval of the subsection (b)(1) application, the thirty-month period referred to in subparagraph (C) shall be extended by such amount of time (if any) which is required for seven and one-half years to have elapsed from the date of approval of the subsection (b)(1) application.

(ii) If an application (which includes any supplement to such application) submitted under subsection (b)(1) for an animal drug, which includes an active ingredient (including any ester or salt of the active ingredient) for use in the same or a different species or class of animals, that is, nonfood producing, ruminant, swine, or poultry, as has been approved in another application submitted under subsection (b)(1), is approved after the date of enactment of this paragraph and if the application contains reports of new investigations (other than bioequivalency studies) essential to the new approval of the application and conducted or sponsored by the applicant, the Secretary may not make the approval of an application (including any supplement to such application) submitted under subsection (b)(2) for the new conditions of approval of such drug in the subsection (b)(1) application effective before the expiration of three years from the date of the approval of the application under subsection (b)(1) for such drug.

(iii) If an application (other than an abbreviated new animal drug application) submitted under subsection (b)(1), for a new animal drug, no active ingredient (including any ester or salt of the active ingredient) of which has been approved in any other application under subsection (b)(1), was approved during the period beginning on the date which is two years before the enactment date of this subsection and ending on the enactment of this subsection, the Secretary may not make the approval of an application which refers to the animal drug for which the subsection (b)(2) application was submitted effective before the expiration of five years from the date of approval of the application under subsection (b)(1).

(d)(1) If the Secretary finds, with respect to an application filed under subsection (b)(1), after due notice to the applicant in accordance with subsection (c) and giving him an opportunity for a hearing, in accordance with said subsection, that—

(A) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b)(1), do not include adequate tests by all methods reasonably applicable to

show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof;

(B) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions;

(C) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity;

(D) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions;

(E) evaluated on the basis of the information submitted to him as part of the application and any other information before him with respect to such drug, there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof;

(F) upon the basis of the information submitted to him as part of the application or any other information before him with respect to such drug, the tolerance limitation proposed, if any, exceeds that reasonably required to accomplish the physical or other technical effect for which the drug is intended;

(G) *the application failed to contain the patent information prescribed by subsection (b)(1);*

[(G)] (H) based on a fair evaluation of all material facts, such labeling is false or misleading in any particular; or

[(H)] (I) such drug induces cancer when ingested by man or animal or, after tests which are appropriate for the evaluation of the safety of such drug, induces cancer in man or animal, except that the foregoing provisions of this subparagraph shall not apply with respect to such drug if the Secretary finds that, under the conditions of use specified in proposed labeling and reasonably certain to be followed in practice (i) such drug will not adversely affect the animals for which it is intended, and (ii) no residue of such drug will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (c), (d), and (h)), in any edible portion of such animals after slaughter or in any food yielded by or derived from the living animals; he shall issue an order refusing to approve the application. If, after such notice and opportunity for hearing, the Secretary finds that subparagraphs (A) through [(H)] (I) do not apply, he shall issue an order approving the application.

(2) In determining whether such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof, the Secretary shall consider, among other relevant factors, (A) the probable consumption of such drug and of any substance formed in or on food because of the use of such drug, (B) the cumulative effect on man or animal of such drug, taking into ac-

count any chemically or pharmacologically related substance, (C) safety factors which in the opinion of experts, qualified by scientific training and experience to evaluate the safety of such drugs, are appropriate for the use of animal experimentation data, and (D) whether the conditions of use prescribed, recommended, or suggested in the proposed labeling are reasonably certain to be followed in practice. Any order issued under this subsection refusing to approve an application shall state the findings upon which it is based.

(3) As used in this subsection and subsection (e), the term "substantial evidence" means evidence consisting of adequate and well-controlled investigations, including field investigation, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and reasonably be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof.

(4) *If the Secretary finds with respect to an application filed under subsection (b)(2), after due notice to the applicant in accordance with subsection (c) and giving him an opportunity for a hearing, in accordance with said subsection, that—*

(A) the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the drug are inadequate to assure and preserve its identity, strength, quality, and purity;

(B) information submitted with the application is insufficient to show that each of the proposed conditions of use has been previously approved for the listed animal drug referred to in the application;

(C)(i) if the listed animal drug has only one active ingredient, information submitted with the application is insufficient to show that the active ingredient is the same as that of the listed drug;

(ii) if the listed animal drug has more than one active ingredient, or permitted uses with other animal drugs, information submitted with the application is insufficient to show that the active ingredients or permitted uses with other animal drugs are the same as those for the listed animal drug, or

(iii) if the listed animal drug has more than one active ingredient or permitted use with other approved animal drugs in animal feed and if the application is for a new animal drug which has an active ingredient or proposed permitted use different from the listed animal drug, information submitted with the application is insufficient to show—

(I) that the other active ingredients or permitted uses are the same as for the listed animal drug, or

(II) that the different active ingredient or proposed use is an active ingredient of, or a proposed use with, a listed animal drug or an animal drug which does not meet the requirements of section 201(w),

or no petition to file an application for the drug with the different ingredient or use was approved under subsection (b)(3)(C);

(D)(i) if the application is for a drug whose route of administration, dosage form, or strength of the drug is the same as the

route of administration, dosage form, or strength of the approved animal drug referred to in the application, information submitted in the application is insufficient to show that the route of administration, dosage form, or strength is the same as that of the approved animal drug, or

(ii) if the application is for a drug whose route of administration, dosage form, or strength of the drug is different from that of the approved animal drug referred to in the application, no petition to file an application for the drug with the different route of administration, dosage form, or strength was approved under subsection (b)(3)(C);

(E)(i) if the application is for a drug for which the methods of analysis for residues of such drug or substances formed in or on food from such drug, tolerances, withdrawal periods, or other use restrictions are the same as the methods of analysis, tolerances, withdrawal times and other use restrictions of the listed animal drug referred to in the application, information submitted in the application is insufficient to show that the drug is bioequivalent to the approved animal drug; or

(ii) if the application is for a drug for which the methods of analysis, tolerances, withdrawal periods or other use restrictions are different from those of the listed animal drug referred to in the application, no petition to file an application for a drug with a different method of analysis, tolerance, withdrawal period or other use restriction was approved under subsection (b)(3)(C);

(F) if the application was filed pursuant to the approval of a petition under subsection (b)(3)(C), the application did not contain the information required by the Secretary respecting the active ingredient, route of administration, dosage form, strength, method of analysis, tolerance, withdrawal period or other use restriction which is not the same;

(G) information submitted in the application is insufficient to show that the (i) drug is bioequivalent to the listed animal drug referred to in the application or meets any criteria established by the Secretary for the listed drug concerning active ingredients that are part of an uncharacterized mixture, (ii) the withdrawal period and tolerance are not the same as the listed animal drug referred to in the application; or, (iii) if the application was filed pursuant to a petition approved under subsection (b)(3)(C), information submitted in the application is insufficient to show that the active ingredients of the new animal drug are of the same pharmacological or therapeutic class as those of the approved animal drug referred to in subsection (b)(3)(A)(i) and that the new animal drug can be expected to have the same therapeutic effect as the listed animal drug when administered to animals for a condition of use referred to in such subsection;

(H) information submitted in the application is insufficient to show that the labeling proposed for the drug is the same as the labeling approved for the listed animal drug referred to in the application except for changes required because of differences approved under a petition filed under subsection (b)(3)(C) or be-

cause the new animal drug and the listed animal drug are produced or distributed by different persons;

(I) information submitted in the application or any other information available to the Secretary shows that (i) the inactive ingredients of the new animal drug are unsafe for use under the conditions prescribed, recommended, or suggested in the labeling proposed for the drug, or (ii) the composition of the new animal drug is unsafe under such conditions because of the type or quantity of inactive ingredients included or the manner in which the inactive ingredients are included or the failure of components of an uncharacterized mixture to meet the criteria established by the Secretary for the approved animal drug;

(J) the approval under subsection (c) of the listed animal drug referred to in the application under subsection (b)(2) has been withdrawn or suspended for grounds described in subparagraphs (A) through (C) of subsection (e)(1); the Secretary has published a notice of opportunity for hearing to withdraw approval of the listed animal drug for grounds described in subparagraphs (A) through (C) of subsection (e)(1); the approval under this section of the listed animal drug referred to in the application under subsection (b)(2) has been withdrawn or suspended under subsection (e) (1) or (3); or the Secretary has determined that the listed animal drug has been withdrawn from sale for safety or effectiveness reasons;

(K) the application does not meet any other requirement of subsection (b)(3)(A);

(L) based on a fair evaluation of all material facts, the labeling of the new animal drug is false or misleading in any particular; or

(M) the application contains an untrue statement of material fact;

he shall issue an order refusing to approve the application. If, after such notice and opportunity for a hearing, the Secretary finds that subparagraphs (A) through (M) do not apply, he shall issue an order approving the application, which shall be made effective on the last applicable date determined under subsection (c)(3).

(e)(1) The Secretary shall, after due notice and opportunity for hearing to the applicant, issue an order withdrawing approval of an application filed pursuant to subsection (b)(1) with respect to any new animal drug if the Secretary finds—

(A) that experience or scientific data show that such drug is unsafe for use under the conditions of use upon the basis of which the application was approved;

(B) that new evidence not contained in such application or not available to the Secretary until after such application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved, evaluated together with the evidence available to the Secretary when the application was approved, shows that such drug is now shown to be safe for use under the conditions of use upon the basis of which the application was approved or that subparagraph **[(H)]** (I) of paragraph (1) of subsection (d) applies to such drug;

(C) on the basis of new information before him with respect to such drug, evaluated together with the evidence available to him when the application was approved, that there is a lack of substantial evidence that such drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling thereof; or

(D) the patent information prescribed by subsection (c)(2) was not filed within thirty days after the receipt of written notice from the Secretary specifying the failure to file such information.

(2) The Secretary shall also, after due notice and opportunity for hearing to the applicant, issue an order withdrawing the approval of an application with respect to any new animal drug under this section if the Secretary finds—

[(D)] (A) that the application contains any untrue statement of a material fact; or

[(E)] (B) that the applicant has made any changes from the standpoint of safety or effectiveness beyond the variations provided for him in the application unless he has supplemented the application by filing with the Secretary adequate information respecting all such changes and unless there is in effect an approval of the supplemental application.

(3) If the Secretary (or in his absence the officer acting as Secretary) finds that there is an imminent hazard to the health of man or of the animals for which such drug is intended, he may suspend the approval of [such application] *any application approved under subsection (c)* immediately, and give the applicant prompt notice of his action and afford the applicant the opportunity for an expedited hearing under this subsection; but the authority conferred by this sentence to suspend the approval of an application shall not be delegated.

[(2)] (4) The Secretary may also, after due notice and opportunity for hearing to the applicant, issue an order withdrawing the approval of an application with respect to any new animal drug under this section if the Secretary finds—

(A) that the applicant has failed to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain such records or to make required reports in accordance with a regulation or order under subsection (1), or the applicant has refused to permit access to, or copying or verification of, such records as required by paragraph (2) of such subsection;

(B) that on the basis of new information before him, evaluated together with the evidence before him when the application was approved, the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to assure and preserve its identity, strength, quality, and purity and were not made adequate within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of; or

(C) that on the basis of new information before him, evaluated together with the evidence before him when the application was approved, the labeling of such drug, based on a fair evaluation of all material facts, is false or misleading in any par-

ticular and was not corrected within a reasonable time after receipt of written notice from the Secretary specifying the matter complained of.

(5) *If an animal drug approved under this section refers in its approved application to a new animal drug the approval of which was withdrawn or suspended for grounds described in subparagraphs (A) through (C) of subsection (e)(1) or which, as determined by the Secretary, has been withdrawn from sale for safety or effectiveness reasons, the approval of the animal drug under this section shall be withdrawn or suspended—*

(A) for the same period as the withdrawal or suspension under subsection (e)(1), or

(B) if the listed animal drug has been withdrawn from sale, for the period of withdrawal from sale or, if earlier, the period ending on the date the Secretary determines that the withdrawal from sale is not for safety or effectiveness reasons.

[(3)] (6) Any order under this subsection shall state the findings upon which it is based.

(f) Whenever the Secretary finds that the facts so require, he shall revoke any previous order under subsection, (d), (e), or (m) refusing, withdrawing, or suspending approval of an application and shall approve such application or reinstate such approval, as may be appropriate.

(g) Orders of the Secretary issued under this section (other than orders issuing, amending, or repealing regulations) shall be served (1) in person by any officer or employee of the department designated by the Secretary, or (2) by mailing the order by registered mail or by certified mail addressed to the applicant or respondent at his last known address in the records of the Secretary.

(h) An appeal may be taken by the applicant from an order of the Secretary refusing or withdrawing approval of an application filed under subsection (b) or (m) of this section. The provisions of subsection (h) of section 505 of this Act shall govern any such appeal.

(i) When a new animal drug application filed pursuant to subsection (b)(1) is approved, the Secretary shall [by notice, which upon publication shall be effective as a regulation,] publish in the Federal Register the name and address of the applicant, *established name of the approved new animal drug and any proprietary name, the patent information submitted under subsections (b)(1) and (c)(2), and any period during which abbreviated applications may not be made effective pursuant to subsection (c)(3)(E),* and the conditions and indications of use of the new animal drug covered by such application, including any tolerance and withdrawal period or other use restrictions and, if such new animal drug is intended for use in animal feed, appropriate purposes and conditions of use (including special labeling requirements) applicable to any animal feed for use in which such drug is approved, and such other information, upon the basis of which such application was approved, as the Secretary deems necessary to assure the safe and effective use of such drug. [Upon withdrawal of approval of such new animal drug application or upon its suspension, the Secretary shall forthwith revoke or suspend, as the case may be, the regulation pursuant to this subsection (i) insofar as it is based on the approval of such applica-

tion.] Upon withdrawal of approval of any new animal drug application filed pursuant to subsection (b)(1), or upon its suspension, the Secretary shall forthwith publish in the Federal Register the name and address of the applicant and the established and any proprietary name of the drug, and a brief statement of the statutory basis for the action (or that such withdrawal is at the request of the applicant).

* * * * *

(o) For purposes of this section, the term "patent" means a patent issued by the Patent and Trademark Office of the Department of Commerce.

* * * * *

OTHER ACTS AFFECTED BY THIS LEGISLATION

UNITED STATES CODE

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

CHAPTER 151—DECLARATORY JUDGMENTS

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 of 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see [section 505] sections 505 and 512 of the Federal Food, Drug, and Cosmetic Act.

TITLE 35—PATENTS

CHAPTER 14—ISSUE OF PATENT

§ 156. Extension of patent term

(a) The term of a patent which claims a product, a method of using a product, or a method of manufacturing a product shall be extended in accordance with this section from the original expiration date of the patent if—

(1) the term of the patent has not expired before an application is submitted under subsection (d) for its extension;

(2) the term of the patent has never been extended;

(3) an application for extension is submitted by the owner of record of the patent or its agent and in accordance with the requirements of subsection (d);

(4) the product has been subject to a regulatory review period before its commercial marketing or use;

(5)(A) except as provided in subparagraph (B), the permission for the commercial marketing or use of the product after such regulatory review period is the first permitted commercial marketing or use of the product under the provision of law under which such regulatory review period occurred; or

(B) in the case of a patent which claims a method of manufacturing the product which primarily uses recombinant DNA technology in the manufacture of the product, the permission for the commercial marketing or use of the product after such regulatory review period is the first permitted commercial marketing or use of a product manufactured under the process claimed in the patent.

The product referred to in paragraphs (4) and (5) is hereinafter in this section referred to as the "approved product".

(b) The rights derived from any patent the term of which is extended under this section shall during the period during which the patent is extended—

(1) in the case of a patent which claims a product, be limited to any use approved for the approved product before the expiration of the term of the patent under the provision of law under which the applicable regulatory review occurred;

(2) in the case of a patent which claims a method of using a product, be limited to any use claimed by the patent and approved for the approved product before the expiration of the term of the patent under the provision of law under which the applicable regulatory review occurred; and

(3) in the case of a patent which claims a method of manufacturing a product, be limited to the method of manufacturing as used to make the approved product.

(c) The term of a patent eligible for extension under subsection (a) shall be extended by the time equal to the regulatory review period for the approved product which period occurs after the date the patent is issued, except that—

(1) each period of the regulatory review period shall be reduced by any period determined under subsection (d)(2)(B) during which the applicant for the patent extension did not act with due diligence during such period of the regulatory review period;

(2) after any reduction required by paragraph (1), the period of extension shall include only one-half of the time remaining

in the periods described in paragraphs (1)(B)(i), (2)(B)(i), and (3)(B)(i) ~~(3)(B)(i), (4)(B)(i), and (5)(B)(i)~~ of subsection (g);

(3) if the period remaining in the term of a patent after the date of the approval of the approved product under the provision of law under which such regulatory review occurred when added to the regulatory review period as revised under paragraphs (1) and (2) exceeds fourteen years, the period of extension shall be reduced so that the total of both such periods does not exceed fourteen years; and

(4) in no event shall more than one patent be extended for the same regulatory review period for any product.

(d)(1) To obtain an extension of the term of a patent under this section, the owner of record of the patent or its agent shall submit an application to the Commissioner. Such an application may only be submitted within the sixty-day period beginning on the date the product received permission under the provision of law under which the applicable regulatory review period occurred for commercial marketing or use. The application shall contain—

(A) the identity of the approved product and the Federal statute under which regulatory review occurred;

(B) the identity of the patent for which an extension is being sought and the identity of each claim of such patent which claims the approved product or a method of using or manufacturing the approved product;

(C) information to enable the Commissioner to determine under subsections (a) and (b) the eligibility of a patent for extension and the rights that will be derived from the extension and information to enable the Commissioner and the Secretary of Health and Human Services *or the Secretary of Agriculture, as appropriate*, to determine the period of the extension under subsection (g);

(D) a brief description of the activities undertaken by the applicant during the applicable regulatory review period with respect to the approved product and the significant dates applicable to such activities; and

(E) such patent or other information as the Commissioner may require.

(2)(A) Within sixty days of the submittal of an application for extension of the term of a patent under paragraph (1), the Commissioner shall notify the Secretary of Health and Human Services if the patent claims any **[human drug]** *human or animal drug* product, a medical device, or a food additive or color additive or a method of using or manufacturing such a product, device, or additive and if the product, device, and additive are subject to the Federal Food Drug, and Cosmetic Act, *or the Secretary of Agriculture if the patent claims a veterinary biological product or a method of using or manufacturing such a product and if the product is subject to the Virus-Serum-Toxin Act*, of the extension application and shall submit to the Secretary a copy of the application. Not later than thirty days after the receipt of an application from the Commissioner, the Secretary shall review the dates contained in the application pursuant to paragraph (1)(C) and determine the applicable regulatory review period, shall notify the Commissioner of the de-

termination, and shall publish in the Federal Register a notice of such determination.

(B)(i) If a petition is submitted to the Secretary under subparagraph (A), not later than one hundred and eighty days after the publication of the determination under subparagraph (A), upon which it may reasonably be determined that the applicant did not act with due diligence during the applicable regulatory review period, the Secretary shall, in accordance with regulations promulgated by the Secretary determine if the applicant acted with due diligence during the applicable regulatory review period. The Secretary shall make such determination not later than ninety days after the receipt of such a petition. *For a product, device or additive subject to the Federal Food, Drug and Cosmetic Act, the [The] Secretary may not delegate the authority to make the determination prescribed by this subparagraph to an office below the Office of the Commissioner of Food and Drugs. For a product subject to the Virus-Serum-Toxin Act, the Secretary of Agriculture may not delegate the authority to make the determination prescribed by this subparagraph to an office below the Office of the Assistant Secretary for Marketing and Inspection Services.*

(ii) The Secretary shall notify the Commissioner of the determination and shall publish in the Federal Register a notice of such determination together with the factual and legal basis for such determination. Any interested person may request, within the sixty-day period beginning on the publication of a determination, the Secretary to hold an informal hearing on the determination. If such a request is made within such period, the Secretary shall hold such hearing not later than thirty days after the date of the request, or at the request of the person making the request, not later than sixty days after such date. The Secretary shall provide notice of the hearing to the owner of the patent involved and to any interested person and provide the owner and any interested person an opportunity to participate in the hearing. Within thirty days after the completion of the hearing, the Secretary shall affirm or revise the determination which was the subject of the hearing and notify the Commissioner of any revision of the determination and shall publish any such revision in the Federal Register.

(3) For the purposes of paragraph (2)(B), the term "due diligence" means that degree of attention, continuous directed effort, and timeliness as may reasonably be expected from, and are ordinarily exercised by a person during a regulatory review period.

(4) An application for the extension of the term of a patent is subject to the disclosure requirements prescribed by the Commissioner.

(e)(1) a determination that a patent is eligible for extension may be made by the Commissioner solely on the basis of the representations contained in the application for the extension. If the Commissioner determines that a patent is eligible for extension under subsection (a) and that the requirements of subsection (d) have been complied with, the Commissioner shall issue to the applicant for the extension of the term of the patent a certificate of extension, under seal, for the period prescribed by subsection (c). Such certificate shall be recorded in the official file of the patent and shall be considered as part of the original patent.

(2) If the term of a patent for which an application has been submitted under subsection (d) would expire before a certificate of extension is issued or denied under paragraph (1) respecting the application, the Commissioner shall extend, until such determination is made, the term of the patent for periods of up to one year if he determines that the patent is eligible for extension.

(f) For purposes of this section:

(1) The term "product" means:

(A) A **[human]** drug product.

(B) Any medical device, food additive, or color additive subject to regulation under the Federal Food, Drug, and Cosmetic Act.

(C) A *veterinary biological subject to regulation under the Virus-Serum-Toxin Act.*

(2) The term "**[human]** drug product" means the active ingredient of a new drug, *new animal drug*, antibiotic drug, or human biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act) including any salt or ester of the active ingredient, as a single entity or in combination with another active ingredient.

(3) The term "major health or environmental effects test" means a test which is reasonably related to the evaluation of the health or environmental effects of a product, which requires at least six months to conduct, and the data from which is submitted to receive permission for commercial marketing or use. Periods of analysis or evaluation of test results are not to be included in determining if the conduct of a test required at least six months.

(4)(A) Any reference to section 351 is a reference to section 351 of the Public Health Service Act.

(B) Any reference to section 503, 505, 507, or 515 is a reference to section 503, 505, 507, or 515 of the Federal Food, Drug, and Cosmetic Act.

(5) The term "informal hearing" has the meaning prescribed for such term by section 201(y) of the Federal Food, Drug, and Cosmetic Act.

(6) The term "patent" means a patent issued by the United States Patent and Trademark Office.

(g) For purposes of this section, the term "regulatory review period" has the following meanings:

(1)(A) In the case of a product which is a human drug product, the term means the period described in subparagraph (B) to which the limitation described in paragraph (4) applies.

(B) The regulatory review period for a human drug product is the sum of—

(i) the period beginning on the date an exemption under subsection (i) of section 505 or subsection (d) of section 507 became effective for the approved human drug product and ending on the date an application was initially submitted for such drug product under section 351, 505, or 507, and

(ii) the period beginning on the date the application was initially submitted for the approved human drug product

under section 351, subsection (b) of section 505, or section 507 and ending on the date such application was approved under such section.

(2)(A) In the case of a product which is a food additive or color additive, the term means the period described in subparagraph (B) to which the limitation described in paragraph (4) applies.

(B) The regulatory review period for a food or color additive is the sum of—

(i) the period beginning on the date a major health or environmental effects test on the additive was initiated and ending on the date a petition was initially submitted with respect to the product under the Federal Food, Drug, and Cosmetic Act requesting the issuance of a regulation for use of the product, and

(ii) the period beginning on the date a petition was initially submitted with respect to the product under the Federal Food, Drug, and Cosmetic Act requesting the issuance of a regulation for use of the product, and ending on the date such regulation became effective or, if objections were filed to such regulation, ending on the date such objections were resolved and commercial marketing was permitted or, if commercial marketing was permitted and later revoked pending further proceedings as a result of such objections, ending on the date such proceedings were finally resolved and commercial marketing was permitted.

(3)(A) In the case of a product which is a medical device, the term means the period described in subparagraph (B) to which the limitation described in paragraph (4) applies.

(B) The regulatory review period for a medical device is the sum of—

(i) the period beginning on the date a clinical investigation on humans involving the device was begun and ending on the date an applications was initially submitted with respect to the device under section 515, and

(ii) the period beginning on the date an applications was initially submitted with respect to the device under section 515 and ending on the date such application was approved under such Act or the period beginning on the date a notice of completion of a product development protocol was initially submitted under section 515(f)(5) and ending on the date the protocol was declared completed under section 515(f)(6).

(4)(A) *In the case of product which is a new animal drug, the term means the period described in subparagraph (B) to which the limitation described in paragraph (6) applies.*

(B) *The regulatory review period for a new animal drug product is the sum of—*

(i) the period beginning on the date an exemption under subsection (j) of section 512 became effective for the approved new animal drug product and ending on the date an application was initially submitted for such animal drug product under section 512, and

"(ii) the period beginning on the date the application was initially submitted for the approved animal drug product under subsection (b) of section 512 and ending on the date after enactment of this section such application was approved under such section.

(5)(A) In the case of a product which is a veterinary biological, the term means the period described in subparagraph (B) to which the limitation described in paragraph (6) applies.

(B) The regulatory period for a veterinary biological product is the sum of—

(i) the period beginning on the date the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act became effective and ending on the date an application for a license was submitted under the Virus-Serum-Toxin Act, and

(ii) the period beginning on the date an application for a license was submitted for approval under the Virus-Serum-Toxin Act and ending on the date after enactment of this section such license was issued.

[(4)] (6) A period determined under any of the preceding paragraphs is subject to the following limitations:

(A) If the patent involved was issued after the date of the enactment of this section, the period of extension determined on the basis of the regulatory review period determined under any such paragraph may not exceed five years.

(B) If the patent involved was issued before the date of the enactment of this section and—

(i) no request for an exemption described in paragraph (1)(B) was submitted,

(ii) no major health or environmental effects test described in paragraph (2) was initiated and no petition for a regulation or application for registration described in such paragraph was submitted, or

(iii) no clinical investigation described in paragraph (3) was begun or product development, protocol described in such paragraph was submitted,

before such date for the approved product the period of extension determined on the basis of the regulatory review period determined under any such paragraph may not exceed five years.

(C) If the patent involved was issued before the date of the enactment of this section and if an action described in subparagraph (B) was taken before the date of the enactment of this section with respect to the approved product and the commercial marketing or use of the product has not been approved before such date, the period of extension determined on the basis of the regulatory review period determined under such paragraph may not exceed two years.

(h) The Commissioner may establish such fees as the Commissioner determines appropriate to cover the costs to the Office of receiving and acting upon applications under this section.

* * * * *

CHAPTER 28—INFRINGEMENT OF PATENTS

§ 271. Infringement of patent

(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed as authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement.

(e)(1) It shall not be an act of infringement to make, use, or sell a patented invention [(other than a new animal drug or veterinary biological product (as those terms are used in the Federal Food, Drug, and Cosmetic Act and the Act of March 4, 1913))] solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs, or *veterinary biological products*.

(2) It shall be an act of infringement to submit an application [under section 505(j) of the Federal Food, Drug, and Cosmetic Act or described in section 505(b)(2) of such Act for a drug] *under a Federal law which regulates the manufacture, use, or sale of drugs or veterinary biological products* claimed in a patent or the use of which is claimed in a patent, if the purpose of such submission is to obtain approval under such Act to engage in the commercial manufacture, use, or sale of a drug or *veterinary biological products* claimed in a patent or the use of which is claimed in a patent before the expiration of such patent.

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XII. MINORITY VIEWS OF SENATOR METZENBAUM

The Animal Drug Amendments and Patent Term Restoration Act of 1986 purports to strike a balance between the interests of pioneer animal drug manufacturers and their generic counterparts.

The bill enhances the patent privileges for pioneer drug companies by extending the patent term available for exclusive marketing. The manufacturer can claim up to one-half of the time required for regulatory review, with a maximum postapproval patent term of 14 years.

In return for concessions on the patent front, the generic drug industry is provided with a streamlined regulatory approval process. Currently, there are legal constraints limiting the approval of generics. Even though a pioneer drug has been on the market for a long period of time, costly and unnecessarily repetitive tests are required before a generic equivalent can be marketed.

We are told that the entry of less costly generic products will entail savings for all of those involved in the use of animal drug products. Veterinarians, farmers, and ultimately consumers would all benefit.

I have always supported removing restrictions on the availability of safe generic drugs. The savings on the human drug side have been undeniable, particularly for our senior citizens. I believe the same advantages should accrue to the users of animal drugs.

However, I do not believe in the linkage to patent term restoration as the public policy price we must pay for the wider availability of generic drugs.

We constantly hear that drug companies are deterred from new investment and new research by their inability to maintain their exclusive marketing rights. The reality is quite different.

The profitability of the drug industry is unrivaled in our economy. There is no evidence that current patent laws are choking off the capital required for research on new products. Such research is continuing at pace-setting levels.

What is clear is the fact that for every year you extend a patent, the consumer loses millions, if not hundreds of millions of dollars. Without the discipline of competition, the industry is free to enact price increases above and beyond any reasonable level.

S. 2407 attempts to link anticompetitive patent extension provisions which are detrimental to consumer interests with provisions to facilitate the marketing of generic animal drugs which are clearly beneficial to consumers. We do not have to accept this linkage. We should not have to give away the store to get generics on the shelves.

I am totally opposed to S. 2407 given the patent extension provisions which are, in my view, indefensible.

The authentic rationale for these provisions is not new drug research or innovative product development. The motivation is unfortunately the "greed and avarice" of the drug industry.

My opposition to this legislation does not mean I am opposing efforts to facilitate the availability of safe generic drug products. I am totally committed to this effort and will continue to do all I can on its behalf.

HOWARD M. METZENBAUM.

